

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

APPEAL FROM ORDER No 596 of 1995

For Approval and Signature:

Hon'ble MR.JUSTICE M.S.PARIKH

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

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JADE PLASTIC

Versus

VIPUL MAHENDRABHAI SHAH

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Appearance:

MR RJ OZA for Petitioners

MR PV HATHI for Respondent No. 1

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CORAM : MR.JUSTICE M.S.PARIKH

Date of decision: 03/08/98

ORAL JUDGEMENT

#. This appeal arises from the impugned order dated 17th October, 1995 rendered by learned Judge (Sr.Division), Bhavnagar in Misc. Civil Application No.161/93. The appellants herein being the defendants in Civil Suit No. 21/1991 faced decree which was passed under O-8 R-10 of the Code of Civil Procedure (for short the 'Code'); they therefore filed Misc. Civil Application No.161/93 for setting aside the said decree

by saying that the said decree was ex-parte decree on account of failure on their part to file written statement. The learned trial judge by his impugned order came to the conclusion that the appropriate remedy for the appellants would be first appeal under Section 96 of the Code and no application for restoration would be maintainable. He therefore dismissed the M.C.A. 161/1993. The appellants have subjected the dismissal of their application under challenge in this appeal from order.

#. Mr.R.J.Oza, learned advocate appearing for the appellants referred to the decisions in the case of Gujarat Co-operative Oil Seeds Growers Federation Vs. Smt. Ramesh Kanta reported in AIR 1994 Delhi - 367 and A.F.O.Association, Secundrabad V. M/s. Innovation Associates, Secundrabad, AIR 1991 Andhra Pradesh - Pg.69 for submitting that a decree passed as a result of failure on the part of the defendant to file written statement as required under Order-8, Rule-10 of Code, would be an ex-parte decree and application under O-9 R-13 of the Code would be maintainable.

Mr.R.J.Oza, L.A. has also referred to a decision of this court in the case of L.G.Nagar Co-operative Housing Society Ltd. Vs. M/s Rajendra Construction Co., reported in 1992(1), G.L.H.-286. In that case, this Court has observed that "it is a trite law to say that an ex parte decree can be challenged in an appeal under Section 96 of the Code or an application for setting it aside can be made under Order 9, Rule 13 thereof". In that case this Court has accepted the submission that any decree or order passed in absence of party or his advocate can also be said as an ex-parte decree, a decree passed as a result of invocation of Order-8 Rule 10 of the Code included.

Reference in the above connection may be made to O-9 Rule 13 of the Code. The O-9 deals with appearance of party and consequence of non appearance. Rule 13 deals with setting aside decree exparte. The said rule reads as under :-

"Setting aside decree ex parte against defendant.

13. In any case in which a decree is passed ex parte against a defendant, he may apply to the Court by which the decree was passed for an order to set it aside; and if he satisfies the Court that the summons was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called on for

hearing, the Court shall make an order setting aside the decree as against him upon such terms as to costs, payment into Court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit :

Provided that where the decree is of such a nature that it cannot be set aside as against such defendant only it may be set aside as against all or any of the other defendants also :

[Provided further that no Court shall set aside a decree passed ex parte merely on the ground that there has been an irregularity in the service of summons, if it is satisfied that the defendant had notice of the date of hearing and had sufficient time to appear and answer the plaintiff's claim ]

[Explanation : Whether there has been an appeal against a decree passed ex parte under this rule, and the appeal has been disposed of on any ground other than the ground that the appellant has withdrawn the appeal, no application shall lie under this rule for setting aside that ex parte decree.]

It can be seen from the operative portion of the aforesaid rule that the first part thereof deals with setting aside of ex-parte decree in any case. The second part deals with service of summon and third part deals with non appearance of the defendant for any sufficient cause when the suit was called on for hearing. It would therefore be clear that the rule deals with passing of a decree in absence of defendant when the decree is passed. Such absence may be on account of summons having not been duly served or on account of any sufficient cause from appearing before the court when the suit is called on for hearing. Under such circumstances, this court had an occasion to observe that a decree would be exparte even where it has resulted on account of non-filing of written statement and consequent non-appearance of the defendant when the suit is called on for hearing.

#. In above view of the matter, it cannot be said that when the written statement is not filed and decree is passed under O-8, R-10, the decree is not an exparte decree. When Order 9 Rule 13 speaks about a decree having been passed exparte, the said provision would be broadly applicable to all the cases where the defendant would not have an opportunity to present himself with his defence before the Court. It is a different matter that he has to show before the trial court sufficient cause

why he was not in a position to file his written statement or to appear when the matter was called out for hearing of the suit. Briefly stated in such cases, a decree passed by the trial court can be said to be ex parte decree. If that is so O-9, R-13 of the Code would be very much applicable to a case where a decree is passed on account of written statement having not been filed by the defendant.

#. In above view of the matter, I am not in position to endorse the view taken by the learned Single Judge of the Patna High Court in the case of Satya Narayan Sah v. Gopalk Mundra, AIR 1991 Patna 60.

#. In the result this appeal shall have to be allowed and the matter shall have to be remanded to the trial court for hearing the restoration application on its merits, while holding that the application for restoration was quite maintainable at law.

#. For the reasons stated above, the impugned order rendered by the trial court is hereby set aside. The trial court is directed to hear the restoration application bearing No.MCA 161/93 on merits and decide the same in accordance with law. This appeal is accordingly allowed with no order as to cost.

Date : 3-8-1998 (M.S.Parikh,J.)

(KPP)